90-229

UNITED STATES SUPREME COURT

OCTOBER 1990 TERM

RES LLOYD, Petitioner, vs. RICHARD T. LONG, Respondent.	Cal. Supreme Ct. No. S0140291 Cal. Court of App. No. G006130 O.C. Sup. Ct. No. 35 98 28

Petition for Writ of Certiorari

to the Court of Appeal of the

State of California

BRIEF IN OPPOSITON TO

PETITION FOR WRIT OF CERTIORARI

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Respondent
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	)	Ct. No. S0140291
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his job as the Community Programs Officer. The majority of those meetings took place during his off duty hours; some time after 5:30 p.m. Monday through Friday or on the weekends. (R.T. 511-512)

Richard Long worked very hard at fulfilling his duties as the Community Programs Officer. As part of his duties, Richard Long had appeared at community meetings on approximately 100 occasions prior to the ACLU Conference. In addition, he had appeared on TV, on all of the major and local networks, approximately twenty-five times prior to the ACLU conference. In fact, during the weeks just prior to the ACLu conference, Richard Long appeared on all of the major local channels on t.v. approximately six or seven times. (R.T. 774, 29, 516-517).

On Friday, October 10, 1980, the very day before the ACLU Conference, an event was held within the City of Newport called the "Cops and Kids Picnic." Richard Long had come up with

the idea to have this event in order to build better relations between the police officers and the children of the City of Newport. He had worked quite extensively to organize and put on the event, which proved to be quite successful, and some of his appearances on the t.v. during the week prior to the ACLU Conference dealt with his efforts on the Cops and Kids Picnic. (R.T. 524-531)

The ACLU Conference was extensively publicized throughout the area as a conference open to anyone who paid their admission fee. There was never any indication in any of the publicity, nor at the conference itself, that certain people were not welcome to attend the conference. (R.T. 83, 130, 426, 635)

Richard Long decided to attend the ACLU Conference after reading about the conference in the newspaper. The article indicated the conference was open to anyone who wanted to attend and that they would be discussing police practices at the conference.

Since the conference was taking place at the Newport Beach High School and they were going to discuss police practices, Richard Long decided to attend the conference believing they would be specifically discussing police practices as it relates to the Newport Beach Police Department. (R.T. 551-552, 555)

One of the topics to be discussed at the conference was the causes of police abuse and the possible remedies to police abuse. In addition, the conference was to discuss legislation which had an impact on police practices. The subject matter of the conference, as indicated in the publicity regarding the conference, would be of interest to the Newport Beach Police Department and specifically to Richard Long as the Community Programs Officer. (R.T. 72-75, 810-812)

On October 11, 1980, Richard Long attended the ACLU Conference. Upon his arrival, he paid the admission fee and the lunch fee and told the person at the desk that he wanted to

attend the Federal Penal Code Seminar and the Police Practices Seminar. He was given a name tag bearing his name, which he wore on this shirt throughout the entire conference. At some time during the registration process a sign-up sheet was present in the are where persons attending the conference paid their fees. The sign-up sheet was used to compile the names and addresses of people attending the conference and did not require disclosure of the persons employment or any affiliation. Richard Long did not see a sign-up sheet and was not requested to sign one, but he would have signed the sheet had he seen it or had been asked to do so. Not everyone who attended the conference signed the sheet. Richard Long was dressed in civilian clothes, not in uniform, which is how he always dressed when attending any community functions. (R.T. 429-430, 434-436, 511, 557-559, 617)

There was not notice in any of the publicity regarding the conference, nor was

there any signs at the conference, nor by any other means, was it indicated that government employees attending the conference because of their jobs were not welcome. (R.T. 635)

Richard Long took notes at the conference. He took those notes so that when he sat down with the Chief of Police to discuss what was said regarding police practices, he could make a logical and complete presentation. Just like at any conference, he summarized everything that was being said, so that later he could utilize only that information which would have been relevant to his discission with the Chief of Police regarding what was said concerning police practices. He would have then trashed the notes after the discussion with the Chief of Police. (R.T. 565-568) Other people who attended the conference were taking notes. (R.T. 149, 450-451)

At some point between 10:00 a.m. and 12:00 noon Ron Talmo became aware that Richard Long was attending the conference. Ron Talmo

recognized Richard Long as the Community Programs officer for the Newport Police Department, after having seem him on TV sometime during the week prior to the conference. (R.T. 29-30, 192-193) Ron Talmo walked up to Richard Long and started a conversation with him. Ron Talmo told him he was at the conference because he had read about it in the local newspaper and had come to find out what the Newport Beach Police Department night have been doing wrong in the eyes of the people who were attending the conference. (R.T. 196-197, 563-563, 809-810) Despite being an ACLU staff attorney at the time, and despite the fact that he felt the presence of Richard Long at the conference was inappropriate, Ron Talmo never told Richard Long that it was inappropriate for him to be at the conference nor did he tell Richard Long that he should identify himself as a police officer to the people at the conference. (R.T. 199, 809-810)

Ron Talmo then finds Meir Westreich

and tells him of Richard Long's presence a the conference. Meir Westreich was on the Board of Directors of the ACLU and was the conference chairperson. Meir Westreich then accompanied Ron Talmo to the school auditorium, where Meir Westreich stopped inside to observe and look at Richard Long for approximately four to five minutes. Meir Westreich then stepped outside the auditorium in the hallway and discussed with Ron Talmo and Meir Westreich what to do with Richard Long regarding his presence at the conference. (R.T. 433, 438-439) This meeting with Ron Talmo and Meir Westreich occurred approximately four hours prior to the time, during the police practices seminar, when Linda Valentino first addressed remarks towards Richard Long.

Meir Westreich then meets with Linda Valentino, Ramona Ripston, and Rees Lloyd, in that order, regarding Richard Long. During each of these meetings, Meir Westreich discussed with each of these people what to do about Richard

Long. As part of the decision on what to do with Richard Long, it was agreed that Linda Valentino would mention Richard Long's name while she was discussing police spying. Rees Lloyd was the last person Meir Westreich met with to discuss what to do with Richard Long. This was the first time Rees Lloyd was told about Richard Long's presence at the conference. All of the discussions between Meir Westreich and Linda Valentino, Ramona Ripston, and Rees Lloyd occurred at least one hour before the police practices session began. (R.T. 66, 324-325, 369, 444-445, 814)

Despite the fact that the chairman of the conference, and a member of the Board of Directors of the ACLu, was aware of Richard Long's presence at the conference, and despite the fact that conversations were held amongst five different individuals regarding Richard Long, all of whom had connections with the ACLU including the executive director of the ACLu, no one ever approached Richard Long to fully

discuss his presence at the conference. No one approached Richard Long to tell him of their alleged concerns regarding his presence at the conference. No one every informed any of the people attending the conference that there was a police office who was attending the conference. It was not until two-thirds of the way through the police practices seminar, some four hours after Richard Long's presence at the conference was first discussed, that Linda Valentino mentioned Richard Long's name as she was addressing the police practices seminar regarding the topic of police spying. (See earlier citations to Reporter's Transcript and Reporter's Transcript 601-602, 814-815)

Ron Talmo, who was an ACLU staff attorney at the time, and who was the person who recognized Richard Long at the conference and discussed with Meir Westreich what to do about Richard Long, held the belief, at the time of the conference, that under no circumstances did a police officer who wanted to attend a public

meeting because of his job have a right to attend any public conferences. The only exception was if the police officer was specially invited to attend the conference. It was also the official position of the ACLU that if a police officer wanted to attend a public meeting in connection with his job and take notes regarding what was said at the meeting, that police officer could be excluded from the meeting. (R.T. 203-204, 128, 143-144, 149)

LEGAL BRIEF

INTRODUCTION

Although there are a number of headings, subheadings and different arguments presented in the Petitioner's opening brief, all of his arguments repeatedly center on one theme: that the First Amendment to the Constitution protects the defendants from any liability for their actions. This is the core of all of the Petitioner's arguments, and thus all of the

Petitioner's arguments must fall since the First Amendment does not immunize Petitioners from liability.

I. THE FIRST AMENDMENT DOES NOT IMMUNIZE THE DEFENDANTS FROM LIABILITY FOR VIOLATING STATE STATUTE

At the very opening of the Petitioner's legal argument portion of their brief they concede that they would have no defense to liability if they had used physical means to eject Richard Long from the meeting. (See Footnote 11, page 19 of Petitioner's Opening Brief.) However, they claim they are immunized from liability because the means used to eject Richard Long from the conference was speech.

The problem with Petitioner's position is that no court has ever held that the First Amendment is absolute in immunizing a person who utilizes speech as a means of achieving certain results from liability imposed by a statute. In

fact, both the United States Supreme Court and the California Court of Appeal have consistently ruled that the First Amendment does not immunize a person from liability for violating a valid statute.

The case of Goldberb v. The Regents of the University of California, 248 Cal. App. 2d 867 (First District 1967) is right on point. In that case, certain students claim that they were improperly disciplined by the University of California for protesting the arrest of a certain person. Id. at 870-873. The plaintiffs claimed that they were engaging in the exercise of their First Amendment rights of free political speech and assembly and that this immunized them from any discipline which might be imposed by the University of California. The Goldberg Court vigorously disagreed with that argument. The court stated that the plaintiffs were arguing that since they were exercising political speech, "they had constitutional right to do whatever, however, and wherever they

pleased." Id. at 878. In rejecting this argument the Goldberg Court made the following cogent observations:

> "That concept of constitutional law was vigorously and forthrightly rejected by the United Sates Supreme Court in Adderly v. Florida (November 13, 1966) 3 U. S.399....These cases recognize that it is not enough for the plaintiffs to assert that they are exercising a 'right' to claim absolute immunity against any form of social control or discipline, for it is well recognized that individual freedoms and group interests can and do clash....An individual cannot escape from social restraint merely be asserting that he is engaged in political talk or action.... Conduct, even though intertwined with expression and association is subject to regulation...."

Id. at 878-79 (emphasis) added and citations omitted).

The Goldberg Court also quoted extensively from the case of Konigsberg vs. State Bar, 336 U.S. 36 (1961). That case dealt with an individual who was denied admission to the State Bar of California because he refused to answer any questions pertaining to his membership in the Communist Party, not on the ground of possible self-incrimination, but on the ground that such inquiries infringed upon his First Amended rights. The plaintiff sued in court claiming his First Amendment rights were violated by the actions of the California State Bar. 336 U.S. at 37-40. The Supreme Court rejected the plaintiff's view that the First Amendment protected him from the liability of being denied access to the State Bar. The Konigsberg Court stated that "at the outset we reject the view that freedom of speech and association...as protected by the First and Fourteenth Amendments, are 'absolutes' not only in the undoubted sense that where the constitutional protection exists it must

prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment." Id at 49.

The Konigsberg Court then went on to state that the Supreme Court had consistently recognized two ways in which the First Amendment did not shield individuals from liability. This analysis by the Konigsberg Court is extremely central to the issues in the case at bar. The Konigsberg Court stated the following:

> "Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech or speech in certain contexts, has been considered outside the scope of constitutional protection.... On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally

> limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have ben found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interests involved."

336 U.S. at 50-51 (emphasis added and citations omitted).

This is the problem with all of the arguments advanced by the Petitioner. He fails to recognize that there are two ways in which the First Amendment will not immunize him from liability. One way is if either the form of the 'defendants' speech or if the speech was made in a certain context it would have been considered outside of the scope of constitutional protection. The trial court found, and so ruled, that the defendants' speech was not outside the scope of constitutional protection.

However, this does not end the inquiry. The First Amendment will also not immunize the defendants from liability, if liability is created by a regulatory statute not intended to control the content of speech, but which incidentally limits the exercise of First Amended rights, and the statute is found to be protecting a subordinating valid governmental interest. The trial court having found that this second way applied, let the case be presented to the jury. As will be more fully developed below, it is crystal clear that the trial court was correct in finding that the defendants' actions came within the second way in which the First Amendment will not immunize them from liability.

The fact that the trial court required the jury to determine the intent or motive of the defendants does not prevent liability on behalf of the defendants due to their claim or protection under the First Amendment. Proof of intent has always been allowed to show a

violation of a regulatory statute even though the conduct of the defendants also involves First Amendment rights.

The case of California Motor Transport Company v. Trucking Unlimited, 404 U.S 508 (1972), involved civil liability under the laws regulating monopolies. The plaintiffs in the trial court had alleged that the defendants had conspired to eliminate and weaken existing and potential competition, for the purpose of monopolizing the highway common carrier business in California, by institution state and federal proceedings in administrative agencies and in the courts to resist and defeat applications by the plaintiffs to acquire operating rights on the highways. Id. at 509-511. The defendants claimed that they could not be held liable under the Sherman Act, an antimonopoly regulation, because they were protected from liability by their First Amendment right to petition.[1]

The California Transport Court recognized that the defendants were exercising

their First Amendment right of petition. However, the court went on to state that the fact they were exercising that First Amendment right did not give them immunity from the regulatory anti-trust laws. 404 U.S. at 513. The Supreme Court held that despite the defendant's First Amendment claims, the plaintiffs had the right to prove that the defendants real intent was to create a monopoly in violation of the statute, and that their claim

they were exercising their First Amendment rights was really a "sham" to cover their real intent to create a monopoly. If the plaintiffs could prove they real intent was to create a monopoly, then they could recover under anti-

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[1] It is important to note that even the Petitioner concedes that the First Amendment rights of freedom and speech, petition and assembly are in actual practice intertwined together and that these rights are accorded the same import under constitutional analysis. (See Petitioner's Opening Brief, p. 19, fn. 13.)

trust law. Id. at 513-516. In a concurring

opinion, Justice Stewart explained that "the respondent's are entitled to prove that the real intent of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent the respondents from invoking these processes." Such an intent would make the conspiracy and attempt to create a monopoly and would create liability on the half of the conspirators under the anti-trust statute. 404 U.S. at 518.

This same result was reached in the case of Costello Publishing Company vs. Rotelle, 670 F.2d 10356 (District of Columbia Cir., 1986). In that case, the marketer of Catholic books brought an anti-trust action and an action for unfair trade practices against various officials of the Catholic Church in the United States. The defendants claim they were insulated from liability under both the anti-trust statute and the unfair trade practices statute because their actions were protected by

the Fist Amendment rights regarding religion. The court relied on the holding and rationale of the California Motor Transport Case that the defendants could not claim immunity from regulation based upon their First Amendment rights Id. at 1048-50.

The California Motor Transport Court made the following important points in ultimately reaching the holding stated above. Those important points were as follows:

> "It is well settled that First Amendment rights were not immunized from regulation when they are used as an integral part of conduct which violates a valid statute....First Amended rights may not be used as a means or the pretext for achieving 'substantive evils... which the legislature has the power to control.... If the end result if unlawful, it matters not that the means used in violation may be lawful."

California Transport vs. Trucking Unlimited, 404

U.S. at 514-15 (emphasis added). The petitioner relies heavily on the case of NAACP v. Claiborne Hardware Company, 458 U.S. 886 (1982), to support their position that the First Amended immunizes them from liability. The problem with the petitioners' reliance on that case is that the Claiborne Case was not a situation in which First Emended Rights were utilized as a means for achieving goals which were themselves prohibited by valid state statute. This very analysis was stated by the Claiborne Court itself after it held that the petitioner's activities were entitled to the protection of the First Amendment. After stating its holding, the Claiborne Court noted that this was not a case where they were "presented with a boycott designed to secure aims that are themselves prohibited by a valid state law." 458 U.S. at 916, fn. 49. (emphasis added). Thus, the Supreme Court itself distinguished the Claiborne Case from the case at bar.

The jury made the following specific

findings: that Richard Long was ejected from the police practices conference; that the defendants intended to eject Richard Long from the police practices conference; that they were motivated to eject Richard Long from the conference solely by the fact that Richard Long was employed as a police officer; and that the defendants were not trying to, nor motivated by any desire to, exercise or protect their First Amendment rights or the First Amendment rights of other conference participants. (App. 99-102)[2].

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2 The petitioner has never attacked the jury findings or verdict as being unsupported by the evidence. They did not attack the jury findings or verdict below, nor have they attached the jury findings or verdict on appeal as being unsupported by the evidence. Even when there has been a challenge to the sufficiency of jury findings or a jury verdict, where the evidence is in conflict an appellate court will not disturb the findings or verdict of a jury. B. Witkin, California Procedure, Vol. 9, Section 278, p. 289 (3rd Ed. 1985). Therefore, it goes without saying that where the verdict and

findings of a jury are not being attacked as being unsupported by the evidence, an appellate court must uphold the findings and verdict of a jury.

Thus, the evidence at the trial and the specific findings of the jury proved conclusively that the defendants were using their First Amendment rights as the means or pretext for achieving a substantive evil and, therefore, their First Amended rights will not immunize them from liability.

In the case of Givoney v. Empire Storage and Ice Company, 436 U.S. 490 (1949), the Supreme Court reaffirmed the rule that First Amended rights will not immunize a person from liability when those rights are sued as an integral part of conduct which violates a valid statute. The Giboney Court stated the principal as follows:

"It is true that the agreements and course of conduct here were as in most

instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed...Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible every to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society."

436 U.S. at 501 (emphasis added). If the appellate courts were to accept the argument of the petitioner, people would be able to achieve arbitrary discrimination in violation of the Unruh Act by means of their First Amended rights and that would make it practically impossible ever to enforce the Unruh Act.

In a case of United States vs.

O'Brian, 391 U.S. 367 (1968) the Supreme Court stated a four-part test to be used in determining when a government regulation can be enforced, and liability be imposed, despite the fact that it will result in an infringement of First Amendment rights. The O'Brian Court first noted that in its past cases it had used a variety of descriptive terms to characterize the quality of the governmental interest which is being protected by the statute. Those descriptive terms included the following: compelling; substantial; subordinating; paramount; cogent; and strong. Id. at 376-377. The O'Brian Court then articulated the four-part test as follows:

> "We think it is clear that a government regulation is sufficiently justified if: (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to

the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest."

391 U.S. at 377. As will be discussed more fully below, each of the elements of the test confirms the fact that the jury verdict should be upheld.

The first three portions of the test can all be analyzed in connection with an analysis of two cases, decided by the Supreme Court, which dealt with state anti-discrimination laws.

The first case was the case of Roberts v. United States Jaycees, 468 U.S. 609 (1984). In that case two local chapters in Minnesota of the Jaycees had been violating the national bylaws by admitting women as regular members. National Organization notified the local chapters that they were considering revoking the local charters because they had admitted women

to membership. Members of the local chapters filed a claim pursuant to the Minnesota Human Rights Act, which is an anti-discrimination statute. Id. at 612-17. The Roberts Court recognized that the enforcement of the Minnesota anti-discrimination act would result in an infringement of the First Amendment rights of the Jaycees. Id. at 622-23. The Supreme Court went on to state that the First Amendment rights could be infringed based upon the test announced in United States v. O'Brian. (Although the test was stated in somewhat different language, it is the same test as announced in United States v. O'Brian.) Id. at 623. The Roberts Court then went on to find that the anti-discrimination act was not aimed at the suppression of First Amendment rights and that the state of Minnesota had a compelling interest in eradicating discrimination and assuring its citizens equal access to publicly available goods and services. Id. at 623-24. In fact, the Roberts court stated that the goal of eliminating

discrimination "which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order." Id. at 624. Finally, the supreme Court found that the restriction on First Amendment rights was no greater than was essential to the furtherance of that compelling state interest. Id. at 626.

The second case is the Board of Directors of Rotary International v. Rotary Club, 95 L.Ed.2d 474 (1987). In that case the Rotary Club in California admitted three women to active membership and the Rotary International revoked the club's charter and terminated its membership in Rotary International. The local club and two of its members sued Rotary International for violation of the Unruh Act. Id. at 480-83. The Rotary Club court then went through the same analysis as it had in the Roberts Case. The court stated that the Unruh Act served a compelling state interest of the highest order in eliminating

arbitrary discrimination. Additionally, the court found that the Unruh Act promoted a state interest which was unrelated to First Amendment freedoms. Id. at 486-87. Finally, the Rotary Club Court held that the restriction on the Rotary Club's First Amendment rights was no greater than was essential to furtherance of the state's compelling interest in eliminating arbitrary discrimination. Id. at 486.

The two cases discussed above are directly on point to the case at bar. Those cases conclusively show that the Unruh Act is within the constitutional power of the state of California, that it furthers a compelling state interest of the highest order and that it is unrelated to the suppression of First Amendment rights. As will be discussed below, the infringement of First Amendment rights in this case is no greater than is essential to the furtherance of that compelling state interest of the highest order.

The application oft he Unruh Act to

prevent the defendants from ejecting a person from a public conference solely because of their employment will infringe, if at all, the defendants First Amendment rights no greater than is essential to the furtherance of that compelling state interest. The Unruh Act will not require the defendants to abandon or alter any of their service activities. It will not require them to abandon any of the basic goals that they have set up for themselves. Nor will it require them to be part of a group which would admit members with whom they would not want to be associated. Nor would the Unruh Act prevent them from expressing any views. It would simply prevent the defendants from arbitrarily discriminating against a person by ejecting them from a public meeting solely on the basis of their occupation and not out of any concern to protect their First Amendment rights. The defendants would still be able to go to Court to seek an injunction preventing a police officer or police department from attending a

public meeting.

It is extremely important to remember that the jury was instructed in such a way that the application of the Unruh Act to this case really placed no restriction on the defendants First Amendment freedoms. The trial court instructed the jury that if they found that the defendants were motivated at all to exercise or protect their First Amendment rights or the First Amendment rights of the other people attending the conference, then the jury must find in favor of the defendants. In other words, the Judge instructed the jury that they could find in favor of the plaintiff only if they determined that the defendants claim that they were protecting their First Amendment rights was s ham or a pretext. Thus, the trial court actually imposed no restriction on the defendants First Amendment rights and gave those rights absolute protection.

As can be seen through the entire discussion above, the appellants core argument

that the First Amendment protects them from any liability for their actions in this case is fallacious. The First Amendment does not protect the appellants from liability based upon the applicable law stated above, the facts of the case, the rulings and instructions of the trial court, and the findings of the jury. As the United States Supreme Court stated in California Motors Transport: "If the end result is unlawful, it matters not that the means used in violation may be lawful." 404 U.S. at 515. Thus, this Court must uphold the judgment below.

II. THE UNRUH ACT SHOULD BE APPLIED TO THIS CASE

The importance of the Unruh Act cannot be seriously debated. As was pointed out above, even the United States Supreme Court has recognized that anti-discrimination statutes serve a compelling state interest of the highest order. The interpretation of the importance of the Unruh Act in the California courts of Appeal

has been no less sweeping.

In Koire v. Metro Car Wash, 40 Cal.3d 24, 28 (1985), the California Supreme Court held that the Unruh Act is to be liberally construed with a view to effectuating the purposes for which it was enacted, and in order to promote justice. See also, Rotary Club of Duarte v. Board of Directors, 178 Cal.App.3d 1035, 1046 (1986). The California Supreme Court stated in the case of In Re Cox, 3 Cal.3d 205 (1970) the following:

> "The nature of the 1959 amendments, the past judicial interpretation of the Act, and the history of legislative action that extended the statutes scope, indicate that identification of particular bases of discrimination -- color, race, religion, ancestry, and national origin -- added by the 1959 Amendment is illustrative rather than restrictive. . . . Although the

> legislation has been evoked primarily by persons alleging discrimination on racial grounds, its language and its history compelled the conclusion that the Legislature intended to prohibit all arbitrary discrimination by business establishments. Finally, in 1961, the Legislature substituted 'all persons' for 'all citizens'. . .in order to broaden further the section and complete the consistent pattern of wide applicability of the section."

3 Cal.3d at 216 (emphasis added).

The Unruh Act's purpose is to prohibit all arbitrary or "stereotypical" discrimination. Koire v. Metro Car Wash, 40 Cal.3d at 35-36. A person cannot be excluded when that exclusion is based upon the persons "race, nationality, occupation, political affiliation, or age. . .". Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721, 726 (1982) (emphasis added).

There is simply no basis for denying the Unruh Acts protection of an interest of the highest order under the facts of this case. As discussed earlier, it is an unchallenged fact that Richard Long was ejected from the conference solely on the basis that he was employed as a police officer. To this the petitioner says -- so what. The Petitioner takes the position that it does not matter that he ejected Richard Long from a public meeting solely on the basis that he was employed as a police officer because he accomplished this by exercising his First Amendment rights (the fallacy of that position was discussed above) and because the Unruh Act should not apply to a police officer who attends a public meeting in connection with his job duties. The fallacy of the latter argument will be revealed below.

As can be seen by the language of the cases quoted above, the Unruh Act is designed to protect police officers--as well as every other class of California residents--against the

effects of arbitrary discrimination. Police officers do not give up their rights when they put on the badge. Police officers are not merely an extension of the government entity for which they work, rather they are still individuals who have rights like any other individual in the state of California.

Under both state and federal law a police officer in the performance of his duty as both an agent of the government and as an individual is personally responsible for his conduct towards third parties. Police officers can be sued individually for tortious conduct committed in the line of duty and can be held personally liable for an award of punitive damages.

Consistent with the petitioner's other arguments regarding his immunity from suit based upon his claim of First Amendment rights, the petitioner states that because police officers represent the government he has no claim to constitutional or statutory protections extended

to members of any other trade or profession, who had initiated a suit for injuries sustained while performing work-related duties. The petitioner takes the untenable position that in order to avoid even the slightest infringement of rights enjoyed by one class of individuals, the courts should broadly eradicate rights which would otherwise be guaranteed to members of another class of individuals.

It is important to note that the California Supreme Court has already addressed the claim that suits initiated by police officers impermissibly threaten rights protected by the First Amendment. In the case of City of long Beach v. Bozek, 31 Cal.3d 527 (1982), the defendant Richard Bozek, had filed a suit against the City of Long Beach and two City of Long Beach police officers for false imprisonment, false arrest, negligent hiring assault and battery. A jury returned a verdict in favor of the City of Long Beach and in favor of City of Long Beach and in favor of the two

police officers. The City of Long Beach and the two police officers then instituted an action against Richard Bosek for malicious prosecution. Id. at 530. The Bosek Court noted that "the right of petition, like other rights contained in the First Amendment and in the California Constitutional Declaration of Rights, is accorded 'a paramount and preferred place in our democratic system.'" Id. at 532. The Court also noted (and as was pointed out above, the petitioner himself had also noted in his opening brief) that the First Amendment right of petition is intimately connected in origin, purpose and use with the other First Amendment rights of free speech and free press. Thus, it is afforded as high a preferred place in our democratic system as the other First Amendment rights of free speech and free press. Id. at 532 and 536.

The Bosek Court went on to carefully distinguish between the constitutional impact of suits brought by a public entity and a suit,

based upon the same set of facts, brought by an aggrieved public employee. The Supreme Court held that:

> "In order to avoid the chilling effect upon the constitutional right of petition which would result if we were to allow municipalities to maintain actions for malicious prosecution, we conclude the best course is to defer to the legislatively provided remedy [of allowing a municipality to recover costs of suit, including reasonable attorneys' fees, against a plaintiff who field a suit in bad faith and without reasonable cause.] An award of expenses of suit by the trial court in an initial action would fully compensate a municipality for its expenses of defending suit. The availability of such an award in combination with the criminal

> sanctions provided in Penal Code §72 for the filing of false claims with the government and the possibility of malicious prosecution actions by individual City employees -- here the police officers -- provide an adequate deterrent to unwarranted lawsuits without unduly infringing upon the right of petition."

Id. at 538 (emphasis added).

This holding represents a repudiation of the very argument being advanced by the petitioner -- that police officers who attend a public meeting in connection with their job duties are merely extensions of the government and, therefore, have no greater right in maintaining a civil action than does the government itself. The Bozek Court deals even more directly with the issue in footnote 9 of the decision. While discussing civil suits maintained by police officers as individuals through their privately employed counsel, the

Court made the following observations:

> "We note, however, that such suits are different from suits by governmental entities themselves in at least two important ways: First, police officers have an interest in recovering damages for harm to their reputations and for emotional distress caused by lawsuits alleging improper conduct ont heir part. Second, suits by police officers do not necessarily raise the specter of a retaliatory policy designed to discourage legitimate exercise of the right of petition through the courts."

Id. at 538, fn. 9.

The Supreme Court clearly recognized that public employees have an interest separate and apart from their governmental employers and as individuals are themselves entitled to the rights and protections guaranteed by the

Constitution and the laws of California. It is important to remember that in stating the positions above, the Bozek Court was dealing with a situation where a police officer was performing job related duties when he took his actions against the defendant and that the Supreme Court also considered the impact of a police officer's civil action upon First Amendment rights. Despite these facts, the Bozek Court pointed out that civil suits by police officers should be allowed and that these suits would not "unduly infringe upon the right of petition." Id. at 538.

The petitioner attempts to evade the Unruh Act by stating that Richard Long attended the meeting in connection with his duties as a police officer. However, under California law, a police officer is always on duty. Several Courts, including the California Supreme Court, have recognized that in exercising the authority vested in a police officer under Section 831 of the California Penal Code, police officers have

duties which extend beyond the period of time for which they are actually paid. See, People v. Corey, 21 Cal.3d 738, 746 (1978); and People v. Derby, 177 Cal.App.2d 626, 630-31 (1960). Moreover, Section 142 of the Penal Code imposes criminal penalties on a police officer, who, at any time day or night, refuses to receive or arrest a person who has committed a criminal offense. Since a police officer must thus always be considered on duty, the petitioner would always argue that a police officer can never be considered as an individual separate and apart from his governmental employer.

What the petitioner is really asking is for a ruling which would allow any business organization, like the ACLU, to exclude a person for no other reason than the nature of his employment. Under this rationale, other public employees would be put in this unhappy category of being disenfranchised from the civil rights enjoyed by all other residents of California. For instance, City Attorneys, City Risk

Managers, Judges, and District Attorneys frequently attend public meetings in connection with their job duties and take notes of what is being said at the meeting. Under the petitioner's rationale, these people could also be ejected from a public meeting and would have no redress since they are no more than extensions of the governmental entity for which they work. In fact, in the extreme, any governmental employee who goes to eat at a restaurant in connection with his job duties, could be excluded from the restaurant solely on the basis of his employment and that governmental employee would have no redress for this arbitrary discrimination. This Court cannot condone a rationale which will lead to such absurdities.

In addition, since when have the Courts ever condoned self help. The petitioner took it upon himself to eject Richard Long from a public meeting. Assuming for the sake of argument that the petitioner had a concern to

protect his First Amendment rights and that is why he ejected Richard Long from the meeting (please keep in mind that the jury made a conclusive finding that he does not have such a motive when he ejected Richard Long from the meeting), the Courts would still not sanction that activity. The Courts have never sanctioned self help. For example, the Courts have never allowed a person to go over to a neighbors house and beat the neighbor up because they felt the neighbor was being too noisy late at night. The proper course of action would have been to seek an injunction preventing Richard Long, or any other police officer from the City of Newport from attending a public meeting sponsored by the ACLU in the City of Newport.[1]

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[1] In fact, the ACLU did seek an injunction for that very purpose and submitted the matter to the trial court upon stipulated facts. The trial court denied that injunction. It is interesting to note that the ACLU stipulated that it had found no evidence during its discovery in that case that the Newport Beach Police Department had, at any time relevant to that action, maintained files or dossiers on persons, groups or organizations

The petitioner's attempt to utilize the case of White v. Davis, 13 Cal.3d 757 (1975) to justify his position. However, even the petitioner points out the fact that White v. Davis is not really on point, yet they attempt to state there are sufficient similarities to make that decision instructive in the case at bar. (See Petitioner's opening Brief, p.72.) White v. Davis is in fact not on point at all and is not instructive for this case.

White v. Davis was a ruling which was expressly and specifically directed at ongoing covert police surveillance of a university classroom. The White ruling does not address

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engaged in lawful non-violent activity. In addition, that ACLU stipulated that the discovery in that action did not reveal any evidence that the Newport Beach Police Department had, at any time relevant to that action, a policy of surreptitiously monitoring or surveilling the activities of any individual, group or organization, unless the activity was directly related to criminal conduct or was unrelated to legitimate police functions. [Appendix 262-268] This stipulated fact document was discussed with the trial court below during the non-suit motion.

itself to all governmental activities, but specifically arises from the Court's special concern for the effects of ongoing covert surveillance upon university classrooms and their environs. Id. at 768. The court noted this special concern for the university setting and the specificity of its holding when it noted that:

> "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teacher's [and student's] concern. That freedom is there for a special concern of the First Amendment, which does not tolerate laws which cast a pall or orthodoxy over the classroom. . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas which discovers

truth 'out of a multitude of tongues, [rather] than through a kind of authoritative selection.'"

Id. at 769 (emphasis added).

Quoting from a decision authored by Justice Frankfurter, the court noted that the dependence of a free society on free universities "means the exclusion of governmental intervention in the intellectual life of the university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indisposable for fruitful academic labor. . . ." White v. Davis, at 770 (emphasis in original).

The White decision represents a special factual situation which is in no way comparable to the case at bar. When a police officer attends a meeting which is advertised as being open to anyone, and where there is never any indication that a particular class of

individuals is not welcome to the meeting, out of a concern for good police-community relations for the purpose of hearing possible complaints about the policies and practices of the police department, this does not amount to a violation of the constitution. In addition, Richard Long was well-known in the community as the community Programs Officer, wore a conspicuous name tag during the entire conference, made numerous appearances on television just prior to the conference, identified himself to Ron Talmo and discussed his purpose for being at the conference during the conversation with Ron Talmo, and was never told by anyone that his presence at the conference was not wanted; until he was ejected from the conference some four house after the conversation with Ron Talmo. The facts of this case simply do not relate at all to the very special circumstances which gave rise to the holding in the case of White v. Davis.

According to the California Supreme

Court, "the freedom to pursue [a] declared right on an equal basis is just as precious as many other freedoms and rights. The exercise of the power of its denial, being a restraint on a personal right, is circumscribed by the same constitutional safeguards of equal protection and due process as are other restraints under penal laws." Orloff v. Los Angeles Turf Club, 36 Cal.2d 734, 739 (1959). If the Unruh Act is viewed as prohibiting any arbitrary class discrimination, it must be viewed as being designed to protect the interests of police officers just as it is viewed as being designed to protect the interests of other citizens of the State of California.

III. REQUEST FOR ATTORNEYS' FEES ON APPEAL

Pursuant to the Unruh Act a person who has discriminated arbitrarily against another person is liable for damages and for attorneys' fees. California Code of Civil Procedure §52. An Appellate Court has the power to fix

attorneys' fees on appeal, when they are authorized by statute. See B. Witkin, California Procedure, Vol. 9, Section 673, p. 648 (3rd Ed. 195). It appears however, that the better practice is to have the trial court determine attorneys' fees when it determines costs on appeal. Security Pacific National Bank v. Adamo, 142 Cal.App.3d 492, 498 (1983).

IV. CONCLUSION

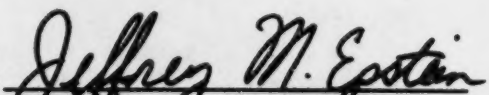
As was cogently stated by the United States Supreme Court in the case of California Motor Transport, "First Amendment rights may not be used as the means or pretext for achieving 'substitute evil'. . .which the legislature has the power to control. . .if the end result is unlawful, it matters not that the means used in violation may be lawful." 404 U.S. at 515. This Court cannot validate the appellants claim that they are insulated from liability because they exercise their First Amendment rights when ejecting Richard Long from the conference. The

end result was unlawful and it matters not that the means used to violated the Unruh Act may have been lawful. This court must uphold the judgment below.

Dated: August 17, 1990

Respectfully submitted,

LAW OFFICES OF
JEFFREY M. EPSTEIN

BY: 
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